for The Defense

Volume 7, Issue 12 ~~ December 1997

The Training Newsletter for the Maricopa County Public Defender's Office ⋈ Dean Trebesch, Maricopa County Public Defender

CONTENTS:

THERE SHE WAS JUST-A-WALKIN' DOWN THE STREET . . .

Unconstitutional Travel Restrictions as Pretense for Arrest and Search

By Karen Kaplan and Emma Lehner
Defender Attorneys

Imagine yourself trying to navigate a big city transformed into an elaborate labyrinth of invisible barriers and forbidden areas. Imagine existing in constant fear of unwittingly crossing these invisible lines and then being held to answer for your violation, whether you were breaking any law or not. What if your home is in the center of one of these forbidden zones? What if you are stopped by the police for strolling across a crosswalk? You might wonder who would create such an unfair system. Communist China? Apartheid South Africa? No, unlucky for us, this situation exists right here in Phoenix, Arizona. Here is our story:

A young woman is walking down a street in central Phoenix, about two blocks from her home. She is on her way to visit her uncle. She stops off at an apartment and comes out eating a burrito. She walks across a street, and is almost immediately stopped, detained, and subsequently arrested by police. Her crimes? First, she was walking too slowly across the street, in violation of ARS §28-795. After being stopped for this violation, the police instruct her to provide her name and birth date. Then, the police discover that she is on "Restriction 16," meaning that she is restricted from being in fifteen areas in the City of Phoenix, including the place where she has been stopped. She may not enter these areas for any purpose, per a City of Phoenix Municipal Court Order. The police arrest the woman for violation of the restriction, and search her incident to arrest. They find contraband in her purse.

In this article, we will examine separately the issues of unconstitutional court-ordered restrictions and unconstitutional statutes used as vehicles for what would otherwise be illegal stops and searches.

UNLAWFUL COURT ORDERED RESTRICTIONS

"As a condition of release, you are not to have any contact with domesticated animals."
Not Guilty Arraignments, State Court, Madison, Wisconsin - Winter, 1997

Here in Arizona, Municipal Court Judges are ordering restrictions just as ridiculous as the one above, and defendants are being searched incident to arrest for violating these restrictions. That search will occasionally dead to the discovery of contraband and the subsequent filing of a felony charge. For example, one of our clients had been charged with prostitution in the City of Phoenix.

(cont. on pg. 2)☞

As a condition of her release, the Municipal Court Judge ordered her to comply with "Restriction 16." This restriction forbids the defendant from entering fifteen areas all over Phoenix for any purpose. The descriptions of the restricted areas are incredibly elaborate and complicated. In this case, the client was restricted from entering the area within which she lives.

We challenged first the legality of an arrest based on the violation of a restriction. Then we focused on the restriction itself as vague and overbroad, leading to lack of notice. In addition, we asserted that the restriction places undue burdens on a defendent, by not merely restricting illegal activities, but forbidding mere presence in certain areas. Finally, we argued that this restriction violates constitutionally protected rights to travel and property interests.

Our client had no hearing, nor was any verified petition by the prosecutor issued, nor did any court issue a warrant or summons for our client for violation of release condition.

THE ARREST

Arizona Rules of Criminal Procedure, Rule 7.5(a), "Issuance of Warrant of Summons" states:

> "Upon verified petition by the prosecutor stating facts or circumstances constituting a breach of the conditions of release, the court having jurisdiction over the defendant may issue a warrant or summons under Rule 3.2, to secure the defendant's presence in court. A copy of the petition shall be served with the warrant or summons."

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for The Defense is the monthly training newsletter published by the Maricopa County Public Defender's Office, Dean Trebesch, Public Defender. ***for The Defense*** is published for the use of public defenders to convey information to enhance representation of our clients. Any opinions expressed are those of the authors and not necessarily representative of the Maricopa County Public Defender's Office. Articles and training information are welcome and must be submitted to the editor by the 10th of each month.

Rule 7.5(c), "Hearing; Review of Conditions; Revocation," indicates that:

> "If, after a hearing on the matters set forth in the petition, the court finds that the person released has wilfully violated the conditions of release, the court may impose different or additional conditions upon his or her release."

Generally, Restriction 16 restricts persons charged with crimes from traveling in fifteen different areas in the City of Phoenix. The information issued to defendants delineating the "Travel Restrictions" states (under a heading entitled "Warning to the Defendant:") "[y]our failure to comply with any conditions of your release may result in your return to custody pending trial or court appearances."

Further down on the page is another heading entitled "Consequences of Violating this Order, Forfeitures and Penalties." Under this heading are warnings that indicate that the defendant may forfeit whatever bond or security he or she has posted, and that: "the court may *issue a warrant for your arrest* upon learning of your violation of any of the conditions of your release. After a hearing, if the court finds that you have not complied with the conditions of release, it may modify the conditions or revoke your release altogether." (Emphasis added).

In our case, our client was ordered to abide by the terms of Restriction 16. When officers determined that our client was in violation of the restriction, they summarily arrested her. Our client had no hearing, nor was any verified petition by the prosecutor issued, nor did any court issue a warrant or summons for our client for violation of release condition. A violation of a condition of release is not an arrestable offense under Arizona Rules of Criminal Procedure 7.5.

THE RESTRICTION AS VAGUE AND OVERBROAD

The order containing Restriction 16 also contains this warning: "Upon finding that you *or any other person named in this order* has willfully violated its terms, the court may also find you in contempt of court and sentence you to *a term of imprisonment, a fine or both.*" (Emphasis added).

(cont. on pg. 3)☞

implication blatantly flies in the face of all notions of due process under both the United States and Arizona constitutions.

Second, the threat of "a term of imprisonment, a fine, or both," without any notice of minimum or maximum penalties violates the notice requirement under the United States and Arizona constitutions. These broad and unbounded threats fail to give "fair warning" or give "a person of ordinary intelligence a reasonable opportunity to know what is prohibited," and further fail to set forth the consequences of a person's actions.

Finally, the fifteen restrictions, in and of themselves, are very confusing and difficult to follow, particularly when one considers that a person ordered to comply with Restriction 16 must avoid all fifteen areas at all times.

To illustrate the mind-numbing confusion these instructions create, number 7 restricts access to: "16th Street from Bethany Home Road (north sidewalk) to Jefferson Street (south sidewalk). This includes sidewalks or other areas with a 16th Street address or any property adjacent to a 16th Street address." Thus, the combination of fifteen restrictions and the confusing manner in which these restrictions are described comprise a restriction which violates the United States and Arizona constitutional due process requirements.

Our client was arrested merely for being present in "the circuit," a location just a few blocks from her home.

THE RESTRICTION AS UNDULY BURDENSOME

Restriction 16 was imposed on our client for an alleged act of prostitution within or very close to "the circuit." When our client was placed on Restriction 16, she was prohibited from lawfully entering any of the fifteen areas of the city listed on the restriction for any purpose. Although our client had no history of any criminal acts in any of the other fourteen areas listed in the "Travel Restrictions," she was summarily banned from all of those areas. Ironically, our client's residence is within the boundaries of "the circuit," which is restriction number 9. Our client was arrested merely for being present in "the circuit," a location just a few blocks from her home. The officers in this case alleged no other prohibited or criminal conduct by our client as a basis for her arrest.

There were a number of other restrictions besides the travel restrictions listed on the form Release Order used in this case. These were:

1. Not to threaten harm or harass the alleged victim(s)
2. Not to return to the scene of the alleged crime
3. Not to initiate contact of any nature with the alleged victim(s) and/or witness(es), including the arresting officer(s)
4. Not to possess any weapons
5. Not to drive after drinking alcoholic beverages
6. Not to drive without a valid Arizona Driver's License in your possession
7. To continue to reside at your present address
8. To stay away from the areas described in TRAVEL RESTRICTIONS (listed on the reverse side) numbers ____.
9. Blank line

None of these restrictions were imposed on our client except number 8, and under number 8, number 16 was circled.(See following attachments) However, the judge could easily have used restrictions number 1-3, which are more appropriate and reasonably related to the alleged crime. Additionally, restrictions number 1-3 are narrowly tailored so that our client could lawfully return to her home and go about her daily business, such as grocery shopping or visiting family, without violating a condition of her release.

Thus, apparently as a matter of routine, our client, and very likely all defendants charged with prostitution, are restricted from entering fifteen areas of the City of Phoenix, regardless of their reasons for entering the areas, and without regard to the location of their residences.

In our client's case, there was no apparent justification or nexus for placing her on restriction for fourteen of the fifteen areas. In addition, rather than prohibit certain conduct, our client was simply banned from the areas. The statement that our client made to officers after her arrest reflect her lack of understanding regarding the boundaries of the areas from which she was restricted. Finally, our client was actually banned from returning to her own home, possibly inadvertently. This is a reflection of the limited investigation conducted before ordering Restriction 16 as well as the overbroad application of these restrictions to defendants, including our client, in the City of Phoenix Municipal Courts.

THE RESTRICTION AS VIOLATIVE OF THE RIGHT TO TRAVEL AND PROPERTY INTERESTS

(cont. on pg. 4)☞

Our client was essentially denied access to her home and property and denied the fundamental right of freedom of travel without due process of law under the United States and Arizona constitutions. When she attempted to access her home and peaceably and lawfully walk on public streets and sidewalks, she was arrested.

UNCONSTITUTIONALLY VAGUE AND OVERBROAD STATUTE

Pedestrians shall move expeditiously, *when practicable*, on the right half of crosswalks. ARS §28-795

Apparently, strolling was outlawed in Arizona when this statute was enacted in 1939. The police stopped our client, ostensibly, because she violated this statute by crossing the street too slowly. The terms "expeditiously" and "practicable" are not defined in the statute. In addition, the plain meanings of these words leave much room for interpretation. *Webster's Ninth New Collegiate Dictionary* defines "expeditious" as: "characterized by or acting promptly and efficiently." "Practicable" is defined as: "1: possible to practice or perform: FEASIBLE 2: capable of being used: USABLE."

Pedestrians shall move expeditiously, *when practicable*, on the right half of crosswalks. ARS §28-795 Apparently, strolling was outlawed in Arizona when this statute was enacted in 1939.

The language in ARS §28-795 is vague and relies on the subjective interpretation and discretion of law enforcement officials to determine either compliance or violation of the statute. In addition, its meaning is sufficiently unclear as to leave great doubt in the minds of citizens attempting to act in a law-abiding manner. Both of these shortcomings culminate in arbitrary application and no fair warning to persons attempting to comply with this statute.

In *Kolender v. Lawson*, 105 S.Ct. 1855, 461 U.S. 352, 75 L.Ed.2d 903 (1983), a California statute requiring a person loitering or wandering the streets to provide "credible and reliable" identification was found void-for-vagueness. The court held that the statute was "unconstitutionally vague on its face because it encourages arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order to satisfy the statute." *Id* at 1860.

Another U.S. Supreme Court case, *U.S. v. Lanier*, 117 S.Ct. 1219, 137 L.Ed.2d 432, 65 USLW 4232 (1997), held that the "fair warning requirement" and the vagueness doctrine bar "enforcement of a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Id* at 1225, citations omitted.

The void-for-vagueness doctrine was further delineated in the recent Arizona case of *Bird v. Arizona*, 908 P.2d 12, 184 Ariz. 198 (1995):

> "A statute is unconstitutionally vague if it fails to give 'a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly' or if it allows for arbitrary and discriminatory enforcement by failing to provide an objective standard for those who are charged with enforcing or applying the law." *Id* at 17.

Finally, in *State v. Jones*, 865 P.2d 138, 177 Ariz. 94 (Ariz.App. Div. 1, 1993), a case dealing with First Amendment issues involving nude-dancing zoning requirements, the Arizona Appellate Court stated that, "[a]s a matter of due process, a law is void on its face if it is so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application." *Id* at 141.

CONCLUSION

The judge in this case found that ARS §28-795 was unconstitutional as applied to our client. He withheld adjudication on the constitutionality of the restriction. The judge requested further briefing and argument, however we are currently in the midst of an indefinite hiatus as our client is in bench warrant status.

Our hope is that, with the aid of this article and attending case law, that more of us will be able to quickly and effectively challenge the use of these types of impermissible restrictions, or odd, outdated, unconstitutional statutes. If you would like a copy of the Motion to Suppress that we filed in this case, please do not hesitate to contact one of us. ■

TRAFFIC ACCIDENT RECONSTRUCTION: A GENERAL OVERVIEW

By Robert Jung
Deputy Public Defender

As time goes on, we are beginning to see more and more vehicular homicide cases, which, had they occurred a year ago, would have been charged as a vehicular manslaughter. Now, however, due to the stricter policies adopted by the Maricopa County Attorney, many of these cases are being charged as Second Degree Murder. Not only does this increase the potential exposure of our clients, but it also makes the defense attorney's knowledge of accident reconstruction more important. The Department of Public Safety, the Phoenix Police Department, the Maricopa County Sheriff's Office and most other police departments, have officers who have specialized training in the field of accident reconstruction. These officers will be called to testify as experts in vehicular homicide cases, as well as vehicular aggravated assaults. While it is not usually feasible or even necessary that the defense attorney be as well-trained as the officer in reconstruction, it is certainly helpful to have a basic knowledge of what reconstruction is, how it is done, and what it can and cannot show.

The important thing to remember is that reconstruction does not try to explain *why* an accident happened.

What is accident reconstruction?

"Traffic accident reconstruction is the effort to determine, from whatever information is available, *how* the accident occurred. Reconstruction is not determining *why* an accident occurred."[1] Although this may seem obvious, there is a subtle, but very important distinction between *how* and *why* an accident occurred. Even if a reconstructionist is able to come to a conclusion as to a theory of how an accident occurred, he cannot, and should not, be allowed to give an opinion as to why the accident occurred. The "why" is often the question that the jury is there to answer. In most cases, without that element, the state has not proven it's case of recklessness.

There are five levels of accident reconstruction:

1. Accident reporting
2. At-scene data collection
3. Technical follow-up
4. Professional reconstruction
5. Cause analysis [2]

Accident reconstruction is dependent first and foremost on the data collected at the scene of the accident. It is upon this data that the reconstructionist forms his opinion as to what occurred.[3] This data generally consists of measurements of the area, including skid marks, gouge marks, amounts of crush on the vehicles involved, etc. It is often compiled by officers other than the reconstructionist, who then turn it over to the reconstructionist for analysis. The reconstruction process progresses from data collection to the more analytical phases, which, by their very nature, do not guarantee that answers will be reached.[4]

The goals of accident reconstruction

The main goal of accident reconstruction is to attempt to describe the events of the accident, determining such things as the vehicle's position on the road, direction of travel, speed, acceleration or deceleration, and rotation.[5] Obviously there are different goals based on different situations. Sometimes the goal may be to determine the driving strategies and evasive maneuvers of the vehicles involved. Other times, the reconstructionist may be called upon to determine who was actually the driver of the involved vehicles. Reconstruction can also be used to determine how injuries were received.

The important thing to remember is that reconstruction does not try to explain *why* an accident happened. Determining why an accident occurred requires describing the entire set of circumstances that were in effect leading up to the accident, which, if duplicated, would produce another, identical accident.[6] This is not the goal of accident reconstruction, nor can it be. The best that a reconstructionist can do is suggest that certain conditions and circumstances were contributing factors to the accident, and they can be taken into account when attempting to determine why an accident occurred.[7]

Limitations on Accident Reconstruction

Although it may not seem like it, not every accident can be reconstructed. The analysis and conclusions to be drawn are limited by the following:

1. Quantity and quality of available data
2. Ability of the reconstructionist
3. Amount of reconstruction required
4. Resources available[8]

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As stated earlier, reconstruction is only as good as the data upon which it is based. If there are errors in collecting the measurements, then it follows that all of the calculations involving those measurements are flawed. Sometimes, no matter how detailed and accurate the measurements, key pieces of data are missing, and it is simply impossible to do an accurate reconstruction. In such cases, the reconstruction is basically pure speculation.

Obviously, the amount of training the reconstructionist has received impacts on his ability to give an accurate opinion. The reconstructionist must be able to recognize the different markings on the road as relevant to the accident, have a working knowledge of the basic sciences, especially physics, mathematics and dynamics, and be able to differentiate between fact and opinion, both in his own thinking, and in the statements of others.[9]

The other main limitations in reconstruction are the amounts of reconstruction required, and the time and money available to do the work.[10] A complete reconstruction of the accident is usually not required, since whichever party is requesting the reconstruction usually has a specific goal in mind, whether it is who was driving the vehicle, speed of travel, or position of the vehicle on the road. When retaining a reconstructionist, it will usually save time and money if you can identify the issues or problems you initially need resolved. Not only will this help his job, but it also makes yours easier since you are focusing on one or two main problems rather than wasting your efforts on irrelevant issues.

Conclusion

This article is meant just as a very general overview as to some of the basics of accident reconstruction, what it is, what it is not, and what is needed to begin a reconstruction. In future articles I intend to get more into the nuts and bolts of actual reconstruction, as well as provide some resources for you to use in your own cases. With the ever increasing number of accidents on our roadways, and the aggressive policies of the prosecutors, you may be doing yourself and your clients a disservice if you do not have at least a basic familiarity with accident reconstruction and how it used in these types of cases.

1. Fricke, Lynn B., Traffic Accident Reconstruction, Northwestern University Traffic Institute, Volume 2, p. 50-3.
2. Id.
3. I should note that there is a recent trend by law enforcement to use terms other than "accident reconstruction" when referring to this topic, shying away from the term "accident." I think that you should use the word "accident" as much as possible, and not refer to it as an "incident" or "collision" as those words tend to be neutral terms at best, whereas "accident" implies no culpability of your client.
4. Id.
5. Id.
6. Id. At 50-4
7. Id.
8. Id.
9. Id. At 50-5
10. Id.

■

RECOGNITION OF YOUR TRIAL RESULTS

By Dean Trebesch
Maricopa County Public Defender

CONGRATULATIONS!! Normally I do not dwell on the results of jury trials, especially since negative results do not usually correspond to the abilities or efforts of the trial attorney. Too many extraneous factors can influence a verdict, masking the defense attorney's extraordinary preparation and presentation skills. And, of course, a customary rule of thumb is that the worst cases, from our perspective, are usually the ones that wind up in trial.

However, I was awestruck by the November edition of our newsletter, which reflected our October trial results. First, I was surprised to see the large number of cases which went to trial that month - 39. Most significantly, I was pleased to note the outstanding trial results our attorneys achieved.

Favorable results were reflected in all but 13 of the 39 trials! That is an incredible statistic, and one which should not be overlooked. Ten were outright not guilty verdicts, while others involved dismissals, pleas to lessers, verdicts for lessers, split verdicts, and mistrials. One trial was still on going.

Under stressful workload conditions, your extraordinary efforts did make a difference! A number of you were in multiple trials, over several days, while still successfully balancing your other cases. You deserve special recognition! ■

COMMITMENT TO EXCELLENCE WINNERS

This year, the office recognized those individuals who exemplified a "Commitment to Excellence." The winners were chosen based on the consistent high quality of their work performance, and their commitment to the ideals and goals of the office. Those who received this honor were:

Patrick Sharrits, Process Server,
Lisa Araiza, Lead Secretary Group B,
Initial Services Department

Yolanda Carrier	Norma Munoz
Sylvia Gomez	Andrew Swierski
Nelida Medina-Tatro	

■

ARIZONA ADVANCED REPORTS

By Steve Collins
Deputy Public Defender

***State v. Sanchez,* 253 Ariz. Adv. Rep. 38 (CA 2, 9/30/97)**

Defendant was convicted of aggravated DUI and placed on probation. As a condition of probation it was ordered that Defendant serve four months in prison and then serve an additional twelve months in county jail. A.R.S. § 13-901(F), limits "confinement" as a condition of probation to a maximum of twelve months. "Confinement" means both prison and jail time. Therefore, Defendant's sentence had to be reduced to four months in prison followed by eight months in jail.

Even though Defendant served less than twelve months in confinement, the issue was not moot because it was an issue which evades review due to the brief term of incarceration and the length of time for appellate review. Further, even though the issue was not raised at the trial level, it was not waived on appeal because a potentially illegal term of probation constitutes fundamental error.

Defendant argued it was improper for a police officer to read the implied consent form to the jury because it is evidence of possible punishment: the loss of a person's driver's license. The Court of Appeals held this evidence was admissible as foundation for appellant's breath test results.

***State v. Nihiser,* 253 Ariz. Adv. Rep. 40 (CA 2, 9/30/97)**

Defendant was convicted of aggravated DUI. A.R.S. § 28-692(F), provides if blood is drawn under the provisions of A.R.S. § 28-691, "only a physician, a registered nurse or another qualified person may withdraw blood for the purpose of determining the alcohol concentration." However, § 28-692(F) further provides, "the qualifications of the individual withdrawing the blood . . . shall not be foundational prerequisites for the admissibility of any blood alcohol content determination."

Defendant argued the statute was unconstitutionally void for vagueness. Defendant claimed it was contradictory to require only limited individuals to withdraw blood but then provide no sanctions when unqualified individuals withdrew blood. The Court of Appeals held the statute was not contradictory because there is a presumption the blood is withdrawn by competent personnel. A defendant has the burden of proof to overcome this presumption.

Defendant also argued the statute violated the separation of powers doctrine because the legislature established an evidentiary rule. The Court of Appeals held there was no violation because the statue "neither conflicts with nor 'tends to engulf' the evidentiary rules pertaining to admissibility, but rather, is a reasonable and workable supplement of the rules."

Defendant argued the statute violated the state and federal equal protection clauses because it created different standards for DUI suspects who gave a blood sample as opposed to a breath sample. The Court of Appeals held there was no violation because in both situations statutes require the person collecting the samples to be qualified.

As a condition of probation for his DUI conviction, Defendant was required to do four months in prison. The majority of the Court of Appeals held he was entitled to credit for presentence incarceration. The dissenting judge felt a defendant is entitled to presentence incarceration credit only if he is given the maximum period of incarceration permitted as a term of probation.

***State v. Leon,* 253 Ariz. Adv. Rep. 3 (SC, 10/1/97)**

During a jury trial, the prosecutor engaged in three forms of improper vouching. First, he told the jury, "when the police have charged or arrested an individual, the County Attorney's Office reviews to determine if there is [sic] sufficient grounds to charge. . . ."

The prosecutor also told the jury:

> You've heard throughout the trial that we made reference to police reports and such. Police reports themselves do not come in as an exhibit in this instance. They have not been admitted and therefore, you will not be getting a copy of that since it does include items which the Judge makes various rulings on.

The trial judge found the prosecutor was implying there was other evidence of guilt which the jury would not get to receive.

The prosecutor further stated to the jury:

> [T]his is not TV. There is not the benefit of all the items you see. We're not going to have the inside information as to what occurred in prior transactions if there were any prior transactions.

Defendant was charged with the sale of drugs. The trial judge found the prosecutor was implying

(cont. on pg. 8)

Defendant had previously been engaged in drug transactions.

The Arizona Supreme Court held that this was prosecutorial misconduct and was highly prejudicial. The case was remanded for a new trial.

***State v. Superior Court (Wing),* 254 Ariz. Adv. Rep. 14, (CA 1, 10/14/97)**

"Attempted" aggravated DUI is a cognizable offense in Arizona. A.R.S. § 28-692(C)(1), does not prevent a defendant from plea bargaining to attempted aggravated DUI when originally charged with the completed offense of aggravated DUI.

***Calik v. Superior Court,* 254 Ariz. Adv. Rep. 22, (CA 1, 10/23/97)**

Proposition 200, the Drug Medicalization, Prevention and Control Act, became law on December 6, 1996. This law precludes imposition of prison for nonviolent first time drug offenses.

A.R.S. § 19-124 requires the legislative council to prepare and submit the secretary of state an impartial analysis of a ballot proposition. The legislative council's "analysis states '[a] person who is sentenced to probation does not serve any time in jail or prison, is under supervision of a probation officer and remains free as long as the person continues his good behavior.'"

The Court of Appeals ignored the legislative council's analysis because the proposition only uses the term "prison" and never specifically mentions the term "jail." Therefore, the Court of Appeals held a first time drug offender may be sentenced to jail as a condition of probation. *Note: a motion for reconsideration has been filed, due to the courts reliance on the new legislation which is on hold because of a referendum.*

***Bolton v. Superior Court,* 253 Ariz. Adv. Rep. 33 (CA 1, 10/7/97)**

Defendant had two actual prior felony convictions for drug possession. He entered a plea agreement in which the prosecutor did not allege the prior convictions and stipulated to "mandatory probation." A.R.S. § 13-901.01 (Proposition 200) mandates probation if a defendant does not have two or more prior drug convictions.

The trial judge rejected the plea, ruling defendant was not entitled to mandatory probation under Proposition 200 because he had two actual prior convictions. Defendant argued he was entitled to probation because the prosecutor had not alleged the prior convictions.

The Court of Appeals held the judge must consider the prior convictions, whether or not the prosecutor alleges them. "Whether a defendant is entitled to be sentenced pursuant to § 13-901.01 is a matter of law to be decided by the court; it is not a matter of pleading or plea bargaining to be decided by the State." This section is unlike A.R.S. § 13-604 which requires the prosecutor to allege a prior felony conviction before a trial judge may consider it for enhancement. *Note: Parts of the opinion rely on the new legislation that amended Prop. 200, but the legislation is now on hold due to a referendum.*

***Myers v. Reeb,* 253 Ariz. Adv. Rep. 32 (CA 1, 10/7/97)**

A defendant charged with misdemeanor DUI is entitled to a jury trial.

***State v. Olvera,* 253 Ariz. Adv. Rep. 46 (CA 2, 8/7/97)**

Defendant was convicted of a felony in 1992. In 1994, A.R.S. § 13-904 was amended to prohibit any felon from possessing a firearm and amended the definition of "prohibited possessor." Defendant was found to have possessed a gun in 1995 and was convicted of misconduct involving weapons while being a prohibited possessor.

When convicted in 1992, the law did not deprive defendant of the right to possess firearms. He contended application of the amendment was the imposition of an ex-post facto law. The Court of Appeals held "the amendments are not being applied to him retroactively; they are prospective only, punishing conduct that occurred after the effective date of the amendments."

"Appellant was already a felon in 1992, and the amendments merely changed his status to a 'prohibited possessor felon.' The amendments did not amount to punishment for his earlier convictions." ■

Shaw Award Presented to Helene Abrams

By Jim Haas
Senior Deputy

The third annual Joseph P. Shaw Award was presented to Helene Abrams at the office holiday party on December 17. The Shaw Award was created in 1995, the 30th anniversary of the office and the year of Joe's retirement, to recognize Joe's integrity and

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years of dedication to the office and the cause of indigent defense. It was presented to Joe himself in 1995, and is awarded each year to the attorney who best exemplifies Joe's considerable qualities.

A plaque was presented to Helene by Dean Trebesch. In addition, Helene's name will be added to a plaque honoring the Shaw Award recipients, which will be permanently displayed in the Training Facility.

Helene has been an attorney in the office since 1981. She did adult trial work from 1981 to 1985, and then transferred to the Juvenile Division. In 1987, she rejoined the Trial Division, spending three years in Group A. She then transferred to the Appeals Division in 1990. In 1993, she was named Juvenile Division Chief, a position she continues to hold today.

Helene has always been well known as a compassionate and fierce advocate for the rights of her clients. This quality was never so apparent as it was during her fight to defeat or mitigate Proposition 102, the Juvenile Justice Initiative that allowed, and even mandated, adult prosecution of juveniles. Helene worked tirelessly against this proposition, fighting what may have been the most uphill battle ever imagined. She spent innumerable hours working on committees and workgroups, spoke to countless civic groups and legislative committees, debated the issues on television and radio programs, wrote articles and letters, and did whatever she or anyone else could think of to get the word out that Proposition 102 was a bad idea. When the proposition was passed by the voters, she continued to fight in an effort to mitigate its impact on our clients, by working to shape the legislation that would implement the proposition, and by litigating the many issues raised by the proposition. She organized the attorneys in our Juvenile Division to flesh out the issues that needed to be litigated, and to craft advice to give to the adult trial attorneys who would soon be assigned to juveniles being prosecuted in adult court. When the first juvenile was automatically sent to adult court, Helene took the case personally, and worked endlessly to litigate the issues, taking the case to the appellate courts and back on numerous issues.

Although Proposition 102 and its implementing legislation have become law, there is no doubt that the impact to our clients has been mitigated as much as possible because of Helene's efforts. And she obtained a dismissal of the case against the first juvenile who was subject to adult prosecution under the proposition.

Helene was selected for the Shaw Award by a committee made up of ten members of the office. Each trial group, juvenile site, division, and the support staff was represented. The members of the committee were recruited by their supervisors, who sought out individuals who would be thoughtful, impartial and open-minded in considering potential recipients. They all volunteered to serve for one year.

The members of the 1997 Shaw Award committee were **Lisa Araiza**, Group B's Lead Secretary; **Gene Barnes**, Trial Group C Attorney; **Elia Hubrich**, Mental Health Division Secretary; **Tom Kibler**, Trial Group D Attorney; **Michelle Lue Sang**, Dependency Division Chief; **Karen Noble**, Trial Group B Attorney; **Pat Ramirez**, Trial Group A Attorney; **Garrett Simpson**, Appeals Attorney; Dave Smith, Mesa Juvenile Attorney; and **Bob Ventrella**, Durango Juvenile Attorney.

In August, the committee solicited nominations for the award from all employees of the office. Twenty-two nominations were received, nominating eighteen attorneys for the award. The committee met only once to consider the nominations, and Helene was their unanimous first choice for the award.

Congratulations to Helene for earning the respect and admiration of her colleagues. The award is well deserved. And many thanks to the members of the committee, who performed their duties thoughtfully and fairly, and made a great choice.

BULLETIN BOARD

Attorney Moves/Changes

James Cleary, Defender Attorney with Group A, left the office effective December 26.

Cary Lackey, Group A Defender Attorney, will leave the office effective January 9.

Diana Squires, Defender Attorney with Group C, will be departing the office on January 2.

New Support Staff

As of January 12, the office will have two new Litigation Assistants. **Renee Rivera** and **Lynda Turner** will be providing support to the attorneys in Group C.

Derek Zazueta began working a temporary assignment with Initial Services on December 8. He holds both an undergraduate degree in Political Science and a Juris Doctorate, from ASU.

Support Staff Moves/Changes

Eugene Cope, Records, left the office on December 19.

Mitch Lincoln, Investigator, will be transferring to Group C from Group D. His move will take effect in January. ■

November 1997
Jury and Bench Trials

Group A

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s)	Result: w/ hung jury, # of votes for not guilty/guilty	Bench or Jury Trial
10/23-10/29	Porteous	Lewis	Lawritson	CR 96-00146 2 Cts. Agg. DUI/F4	Guilty	Jury
11/3-11/5	Lackey	Dougherty	Newell	CR 97-01867 Agg. DUI/F4	Not Guilty - Agg. DUI; Guilty - Driving on Suspended License(lesser included)	Jury
11/5-11/6	Tosto	Dougherty	Lynch	CR 97-00417 Theft/F3 (2 allegeable priors while on probation)	Guilty of Theft/F4	Jury
11/7-11/10	Porteous	Martin	Morrison	CR 96-12854 Agg. DUI/F4 (w/1 prior)	Guilty	Jury
11/13-11/17	Parsons	Galati	Doering	CR 97-08290 Endangerment/F6	Not Guilty	Jury
11/13-11/20	Passon	Yarnell	Lawritson	CR 97-01398 2 Cts. Agg. DUI/F4	Guilty	Jury
11/17-11/20	Tosto/ Robinson	Baca	Amato	CR 97-00238 3 Cts. Burglary/F4; Kidnap/F2; Unlawful Imprsnmnt/F6; Att. Molest/F3; 5 Cts. Sex Conduct w/Minor/ F2; 2 Cts. Child Molest/F2; Sex Abuse/F3	Withdrew in Day 4 of Trial	Jury
11/18-11/24	Leal	Cole	Cappellini	CR 96-05084 Agg. DUI/F4; Leaving Scene of Accident/F6	Guilty	Jury

(cont. on pg. 11) ☞

Group B

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s)	Result: w/ hung jury, # of votes for not guilty/guilty	Bench or Jury Trial
10/27-10/31	Siegel/ Castro	Sticht	Cappellini	CR 97-05124 2 Cts. DUI/F4	Guilty	Jury
11/3-11/5	L. Brown/ Corbett	Padish	Kuffner	CR 97-06214 Aggravated Assault, Dangerous/F3 Disorderly Conduct, Dangerous/F6	Not Guilty on both counts.	Jury
11/4-11/7	Roth/ Corbett	McDougall	Pappalardo	CR 97-07764 Forgery/F4	Hung	Jury
11/7-11/13	Taradash	McDougall	Davidon	CR 97-02962 1 Ct. Grand Theft Vehicle/F2 2 Cts. Grand Theft Vehicle/F3	Not Guilty on all counts.	Jury
11/12-11/13	Tom/ Erb	Sticht	Gaertner	CR 97-03207 Possession of Dangerous Drugs for Sale/F3	Guilty	Jury
11/12-11/14	Sheperd	Hotham	Pappalardo	CR 97-06742 Ct. 1 Possession of Meth. for Sale/F3 Ct. 2 Import/Transport Dangerous Drugs/F2 Ct. 3 Possession of Marijuana/F4 Ct. 4 Misconduct Involving Weapons/F4	Ct. 1 - Not Guilty -- Guilty of Lesser Included Possession of Dangerous Drugs Ct. 2 - Not Guilty Ct. 3 - Guilty Ct. 4 - Guilty	Jury
11/12-11/19	J. Brown	Lewis	Mitchell	CR 97-00144 Sexual Conduct w/Minor/F2 Sexual Abuse under 15/F3	Hung jury on Sexual Conduct with Minor. Guilty of Sexual Abuse under 15.	Jury
11/17-11/18	Duncan	Sticht	Lehman	CR 97-02678 Possession of Methamphetamine/F4	Not Guilty	Jury
11/19-11/20	F. Gray/ Castro	McDougall	Grimes	CR 97-07145 Attempted Burglary, 2°/F4 Criminal Damage/M1	Not Guilty on both counts.	Jury
11/21-11/24	J. Brown	Skelly	Lehman	CR 96-05748 Burglary/F4 Theft/M1	Not Guilty on both counts.	Jury
11/24-11/25	Lopez	Hotham	Gorman	CR 96-10719 Offer to Sell Narcotic Drugs/F2 with 2 priors	Guilty	Jury
11/25-11/26	Liles	Wilkinson	Wilkes	CR 97-09197 Possession of Narcotic Drugs/F4	Not Guilty	Jury

(cont. on pg. 12) ☞

Group C

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s)	Result: w/ hung jury, # of votes for not guilty/guilty	Bench or Jury Trial
10/23-11/3	Squires/ Clesceri & Thomas	Hendrix	Goldstein	CR 97-90047 2 Cts.Agg Asslt/ F3D, Miscond w/Wpn/ F4D, Shoplift /M1	Guilty Misdem. Shoplifting Hung Jury, 11 to 1 to convict on the other three charges-- to be retried	Jury
10/27-10/28	Antonson/ Beatty	Grounds	Fuller	CR 97-91550 1 Ct. Crim Trespass/ F6 1 Ct. Int w/Jud Proc/ M1	Guilty on both	Jury
10/27-10/30	Lachemann	Ishikawa	Glow	CR 97-90691 1 Ct. Mari Poss f/Sale/ F4	Not Guilty	Jury
11/3-11/5	Lachemann	Ishikawa	Brenneman	CR 97-94084 1 Ct. Cocaine Poss f/Sale/ F4	Guilty	Jury
11/3-11/3	Stinson	Araneta	Fuller	CR 97-92345 1 Ct. Agg Asslt/ F3 1 Ct. Kidnapping/ F2	Guilty on both	Bench
11/3-11/12	Corbitt/ Clesceri	O'Tool	Stelly	CR 97-90773 Agg Asslt/ F3D Endangmt/ M1 Lv Sce Inj Acct/ F6	Guilty on Agg Aslt Direct Verd as to Dang. Guilty on Lv Sce Inj Acct	Jury
11/4-11/10	Squires/ Thomas	Araneta	Flader	CR 97-92133 Agg Asslt/ F3 Miscond w/Wpn/ F6D, Disord Cond/ F6 w/two priors	Guilty of Miscond w/Wpn Dismiss Agg Aslt and Disord Cond w/Prej. Found Guilty on Priors	Jury
11/12-11/20	Gaziano	Araneta	Perrin	CR 97-92584 Burg/ F3	Guilty	Jury
11/13-11/19	Stein	Grounds	Vincent	CR 97-92323 Kidnapping/ F2 Arson/ F2 Agg Asslt/ F4	Not Guilty on all charges	Jury
11/17-11/18	Barnes	Skelly	Gundacker	CR 96-92318 Agg DR/BA .10+/ F4 Agg DUI/ F4	Hung Jury on DUI (No info on the number) Guilty on Lesser, Dr. w/Susp. Lic.	Jury
11/19-11/20	Bingham	Ishikawa	Smyer	CR 96-90326 POM/ F6	Guilty	Jury
11/19-11/19	Schmich	Hendrix	McCauley	CR 97-92088 Agg Asslt/ F3	Dismissed w/o Prej.	Bench
11/19-11/19	Schmich	Helton	Drexler	CR 97-00156A Interf w/Jud Proc/ M1	Not Guilty	Bench
11/20-11/26	Lorenz & Silva/ Breen	Grounds	Goldstein	CR 97-91600 Agg Asslt/ F3D	Not Guilty	Jury

(cont. on pg. 13) ☞

Group D

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s)	Result: w/ hung jury, # of votes for not guilty/guilty	Bench or Jury Trial
11/3-11/7	Carrion	Lewis	Lawritson	CR 96-07327 2 Cts. Agg. DUI/F4	Guilty	Jury
11/3-11/5	Kibler	Galati	Amato	CR 97-01778 1 Ct. Kidnapping /F2 1 Ct. Sexual Assault/ F3 1 Ct. Burglary/ F3 1 Ct. Agg. Assault/ F6	Guilty	Jury
11/4-11/6	Billar	Hilliard	Cutler	CR 97-01287 1 Ct. Poss of Dangerous Drugs/ F4	Guilty	Jury
11/6-11/18	Leyh	Katz	Keyt	CR 97-03061 1 Ct. Poss Ampethamines/ F4 1 Ct. Marij-Poss,Grow, Proc./ F6 1 Ct. Poss Drg Paraphernlia/ F6	Guilty	Jury
11/12-11/18	Nickerson	Hilliard	Petrowski	CR 97-06095 1 Ct. Agg Assault/F6 1 Ct. Resist Arrest/F6	Not Guilty-Both counts	Jury
11/17-11/18	Gavin	O'Melia	Boyle	CR 97-06859 2 Cts. Agg Assault on Police Offcers/F5	Guilty	Jury
11/17-11/17	Silva	Johnson	Ronald	TR 97-08309 East # JC DUI/ M1.	Not Guilty	Jury
11/18-11/24	Schreck	Bolton	Petrowski	CR 97-06770 1Ct. Theft/ F3	Guilty	Jury
11/19-11/25	Schaffer	Katz	Court	CR 97-08952 1 Ct. Burglary - Armed/ F2 1 Ct. Agg Assault/ F6 1 Ct. Agg Assault/ F3D	Not Guilty - Burglary -Armed Guilty - Both Counts Agg Assault	Jury

Office of the Legal Defender

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s)	Result: w/ hung jury, # of votes for not guilty / guilty	Bench or Jury Trial
10/20-11/7	Ivy & Taylor /Soto	Cole	Breeze	CR 95-10972 Murder 2d, C	Hung Jury	Jury Trial
10/22-11/18	Steinle, Parzych & DeSanta/ Brandenberger	Nastro	Ditsworth	CR 96-04715 Murder 2d, C1D	Guilty	Jury Trial
10/30-11/4	Allen	Aceto	Smyer	CR 97-92124 Agg.Asslt, C3D	Guilty	Jury Trial


COMING ATTRACTIONS
The Annual DUI Seminar
Friday, February 20, 1997
Watch for upcoming details!!!

INSIDE ADDITION

The Insider's Monthly December 1997

Training News

By Lisa Kula, Training Administrator

What's your New Year's Resolution for 1998? If it includes staying fit, organizing your chaos, brushing up job skills or learning new ones you're in luck. The Organizational Planning and Training department has distributed the training catalog for the first quarter of 1998. They have just the class you need to jumpstart your resolutions for 1998. Contact your supervisor or Lisa Kula for a catalog.

Personnel Profile

Helene Abrams
Juvenile Division Chief

It started as a three month temporary position for Helene Abrams. That was in 1981. Sixteen years later, she has become one of the standout representative of our office and the juvenile criminal justice system. Last week she was presented with the Joe Shaw award in recognition of her career.

Helen joined the MCPD soon after her graduation from the University of Arizona College of Law. She also received her undergraduate degree in Philosophy from U of A. She has found her background in Philosophy to be extremely useful in her legal career, which requires the ability to think critically and question assumptions.

Helene feels that her decision to practice criminal defense work for the indigent, is the result of many different influences. One of these influences occurred when she worked for the Legal Aid Society during law school. That position exposed her to the hardships people experience in domestic relations cases, and instilled in her a sense of compassion for those run over by the legal system. Once she stepped foot in the courtroom and was successful in her first criminal jury trial, she realized that she had found her home and there was no turning back. She also credits genetics for her desire to help the less fortunate as her grandfather, Irving S. Abrams, was an attorney who fought tirelessly for labor rights in Chicago.

In the past sixteen years, Helene has seen many changes in the office. She has a unique perspective because her experience in the office includes working in Trial Group A, Appeals, and Juvenile, where she is currently the Division Chief. She feels the best part of her current position is the diversity. Lobbying for juvenile causes, training new attorneys, administrative tasks, committee work, and yes, even still, trying cases, lead to an exciting if not an exacting work environment. Some of the greatest demands come when she must practice diplomacy in the midst of some hostile environments.

Even so, she still admits that the greatest challenge of all is balancing work and family. "I could never do all of this without the support and help of [husband] Brian." Brian Bond is a Defender Attorney with Group A, so he can truly understand her work demands. Sons Jack, 10 and Eric 8, are thrilled to have mom home during this holiday season. The boys are hoping their mom can handle the assembly of holiday toys as well as she handles her cases!

Overall, Helene has found that prioritizing her time and energies to the things that matter the most, has allowed her to achieve not only professional success but also personal fulfillment.